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Professional Sports League Commissioners' Authority and Collective Bargaining

MATTHEW J. PARLOW^{*}

ABSTRACT

With the National Basketball Association (NBA) and National Football League (NFL) collective bargaining agreements set to expire within the next two years, many experts are already predicting what changes may be made to both leagues' governing labor documents. One likely point of contention between the owners and the players' unions—though rarely discussed in the experts' predictive discourse—is the power of the respective league commissioners to punish or discipline wayward players for misbehavior committed off of the court or field. This article will analyze this area of sports law by exploring this power of each league's sports commissioner, as well as its place and significance in collective bargaining.

This article will begin in Part II by giving a brief overview of the rise in commissioner discipline for players' misbehavior committed off of the court or field and why commissioners punish in this manner. Parts II and III will track and situate the source of the commissioners' power to discipline for such reasons—namely, in the leagues' respective collective bargaining agreements. Part IV will describe how courts and arbitrators have treated commissioners' decisions to punish players for their actions off of the court or field, and posit why such treatment is a concern for the labor unions representing professional athletes in these two leagues. Part IV will then give an overview of the collective bargaining process and the effect it has on this power of each league commissioner. Part IV will also explore why the players' unions will likely make this power of the league commissioner a provision of the collective bargaining agreement that will be negotiated over, unlike in years past. Finally, Part V will provide some concluding insights.

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I. INTRODUCTION

The National Football League Players Association (NFLPA)—the union that represents professional football players in the National Football League (NFL)—has thrown down the gauntlet for its upcoming renegotiation of its collective bargaining agreement (CBA) with the NFL.¹ The National Basketball Players Association (NBPA)—the union that represents professional basketball players in the National Basketball Association (NBA)—may follow suit. Many are predicting that traditional substantive terms of each of the league's respective CBA will be the focal points that determine whether labor peace can be achieved: salary cap,² revenue sharing,³ and others. However, one area of the CBA negotiations for the NBA and the NFL that has received little attention, but that may prove integral to the success of these negotiations, is the power of the respective league's commissioners to discipline wayward athletes for misbehavior

1. See *Goodell's Authority To Be Part of Talks*, ESPN.COM, July 28, 2009, <http://sports.espn.go.com/nfl/news/story?id=4360661> (quoting NFLPA Executive Director DeMaurice Smith discussing his union's intention to negotiate over the NFL Commissioner's power to discipline athletes in the new CBA).

2. See, e.g., Ken Berger, *Owners Share Grim Figures with Players as CBA Negotiations Begin*, CBSSPORTS.COM, Aug. 4, 2009, <http://www.cbssports.com/nba/story/12022364> (discussing the drop in league-wide revenue, the resulting reduction in the NBA salary cap, and the implications for the renegotiation of the CBA).

3. See, e.g., Barry Wilner, *NFLPA Challenges League Cutting Portion of Revenue Sharing*, STAR TRIB. (Minneapolis), Dec. 22, 2009, http://www.startribune.com/templates/Print_This_Story?sid=79912472 (noting the NFLPA's challenge to the NFL elimination of a supplemental revenue-sharing program between the NFL teams).

committed off of the court or field. This article will analyze this unique area of sports law by exploring the power of each leagues' commissioner and its place in collective bargaining.

This article will begin by giving a brief overview of the rise of commissioner discipline as a consequence of players' misbehavior committed off the court or field, and explore why commissioners punish in this manner. Parts II and III will track and situate the source of the commissioners' power to discipline for such reasons—namely, in the leagues' respective CBAs. Part IV will describe how courts and arbitrators have treated commissioners' decisions to punish players for their actions off the court or field and posit why such treatment is a concern for the labor unions representing professional athletes in these two leagues. Part IV will then give an overview of the collective bargaining process and the effect it has on this power of each league's commissioner. Part IV will also explore why the players' unions will likely make this power of the league commissioner a term of the CBA that will be more heavily negotiated over, unlike in years past. Finally, Part V will provide some concluding insights.

II. THE RISE OF COMMISSIONER PUNISHMENT AND THE REASONS BEHIND IT

In the past decade, professional sports have seen an increase in the discipline doled out by professional sports league commissioners⁴ to players who act inappropriately off the court or field.⁵ Some misbehavior has been criminal in nature, such as Michael Vick's involvement in dogfighting and gambling,⁶ Plaxico Burress's unlawful carrying and discharging of a firearm,⁷ or Gilbert Arenas's possessing and drawing a gun on teammate Javaris Crittenton in the Washington Wizards locker room.⁸ However, commissioners have also suspended players for actions which were not criminal, but instead brought disrepute and embarrassment to the league—actions which run counter to the best interest of the sport.⁹ A quintessential example of this type of discipline occurred when Major League

4. Hereafter, when I refer to "commissioners," I will be referring to professional sports league commissioners for the NBA, NFL, Major League Baseball (MLB), and National Hockey League (NHL).

5. Janine Young Kim & Matthew J. Parlow, *Off-Court Misbehavior: Sports Leagues and Private Punishment*, 99 J. CRIM. L. & CRIMINOLOGY 573, 574 (2009).

6. *Vick Suspended Indefinitely After Filing Plea*, NFL.COM, Aug. 25, 2007, <http://www.nfl.com/news/story?id=09000d5d801c1644&template=without-video&confirm=true>; see also Mark Maske, *Falcons' Vick Indicted in Dogfighting Case*, WASH. POST, July 18, 2007, at E1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701393.html> (detailing the 19-page indictment against Vick alleging that he was involved in the dogfighting operation, attended and gambled on fights, and participated in the execution of under-performing dogs).

7. *Burress Pleads Guilty on Felony Charge*, ESPN.COM, Aug. 21, 2009, <http://sports.espn.go.com/nfl/news/story?id=4411373> (commenting on Burress's suspension by NFL Commissioner Roger Goodell after Burress's guilty plea to one count of attempted criminal possession of a weapon, after being charged with two counts of criminal possession of a weapon and one count of reckless endangerment).

8. *Arenas Suspended Indefinitely*, ESPN.COM, Jan. 7, 2010, <http://sports.espn.go.com/nba/news/story?id=4802267> (describing NBA Commissioner David Stern's indefinite suspension of Arenas because of Arenas's behavior both in the locker room and afterward).

9. See Kim & Parlow, *supra* note 5, at 582-83.

Baseball (MLB) Commissioner Bud Selig suspended then-Atlanta Braves pitcher John Rocker for making racially-insensitive statements to a *Sports Illustrated* reporter.¹⁰

This recent increase of commissioner-imposed discipline demonstrates a broadening of the types of players' behavior which have been deemed appropriate for commissioner punishment. In the past, commissioners handed down discipline for players' misbehavior on the court or field or in relation to drug testing. However, this more recent phenomenon provides a more expansive purview of punishable behavior. While this shift may be in application only, as opposed to legal right—which the commissioners have always had—it is, nonetheless, noteworthy.

This change should not be altogether unsurprising. In 2000, NFL Commissioner Paul Tagliabue acknowledged that criminal behavior by players off the field had become an important area for reform in the NFL.¹¹ Indeed, commissioners have many legitimate reasons for disciplining athletes for their actions off the court or field. Economic realities provide one such justification. Players' misbehavior can affect a professional sports league's—or one of its team's—image and profitability.¹² In response to inappropriate athlete behavior, fans may attend fewer games (and thus buy less merchandise and concessions), and corporations may cancel or choose not to renew their sponsorships of a league or team.¹³ Accordingly, commissioners discipline wayward athletes to deter them and other athletes from acting in such an inappropriate manner again and to send a signal to fans and sponsors that such behavior is not tolerated by the league.

However, such punishment is not always so self-interested. Commissioners also impose discipline on wayward athletes in an attempt to rehabilitate them. For example, several scholars have noted the problems with professional athletes and violence against women.¹⁴ Many attribute this violence as an extension of the aggression and violence required to excel on the court or field.¹⁵ In response, commissioners punish athletes that engage in violence against women not only to protect the reputation of their league¹⁶—by denouncing the behavior—but also to require players to seek counseling to help them

10. *Id.* Another example is MLB Commissioner Bowie Kuhn's suspension of former MLB pitcher Denny McLain for associating with gamblers. See William Leggett, *Denny McLain: Ready for his Comeback Try*, SPORTS ILLUSTRATED, June 29, 1970, at 20, available at <http://sportsillustrated.cnn.com/vault/article/magazine/MAG1083763/index.htm>. NBA Commissioner David Stern also fined former Chicago Bulls player Dennis Rodman \$50,000 for referring to Mormons as "assholes" in 1997. Karen Martin Dean, *Can the NBA Punish Dennis Rodman? An Analysis of First Amendment Rights in Professional Basketball*, 23 VT. L. REV. 157, 157 (1998). Stern also fined then New Jersey Nets Coach John Calipari for calling a reporter a "Mexican idiot." See Selena Roberts, *Ethnic Insult from Calipari Results in Apology by Nets*, N.Y. TIMES, March 24, 1997, at C1, available at <http://www.nytimes.com/1997/03/24/sports/ethnic-insult-from-calipari-results-in-apology-by-nets.html?pagewanted=1>.

11. Sean Bukowski, Note, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 VAND. J. ENT. L. & PRAC. 106, 106-07 (2001).

12. *Id.* at 107.

13. *Id.* at 107-08.

14. See, e.g., Ellen E. Dabbs, *Intentional Fouls: Athletes and Violence Against Women*, 31 COLUM. J.L. & SOC. PROBS. 167 (1998); Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 SPORTS LAW. J. 69 (2004); Kimberly M. Trebon, *There is No "I" in Team: The Commission of Group Sexual Assault by Collegiate and Professional Athletes*, 4 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 65 (2007).

15. See Dabbs, *supra* note 14, at 170 (explaining the view that athletes have difficulty "turning off" the violent and aggressive traits taught by their sports); see also Moser, *supra* note 14, at 71 (describing the character traits that distinguish athletes from normal citizens).

16. See Kim & Parlow, *supra* note 5, at 590-91 (comparing punishment in sports leagues to employment-related punishment).

learn from their mistakes and avoid repeating such behavior in the future.¹⁷ Finally, commissioners have an incentive to punish misbehaving athletes because of the role model factor. Despite former NBA star Charles Barkley's protestations,¹⁸ professional athletes are role models.¹⁹ Commissioners are mindful of the good image that professional athletes must project for their devoted fans—particularly kids—and thus discipline athletes accordingly to reinforce the good character required of them.²⁰

While commissioners may have compelling reasons for disciplining wayward athletes for actions committed off of the court or field, the practice of doing so is somewhat controversial. As noted above, this may be due, at least in part, to commissioner punishment evolving solely (or largely) from instances of misbehavior committed on the court or field to a much more expansive purview of behavior that includes actions in athletes' private lives. The controversy may also stem from the fact that the power given the commissioner in his league's governing documents has not been at the forefront of negotiations between the players' labor unions and the leagues. Whichever it is, as the power of the commissioner to discipline begins to emerge as an important term in collective bargaining, it is helpful to trace the history of this power and understand its evolution.

III. THE BEST INTEREST CLAUSE AND THE POWER OF THE COMMISSIONER

A. Origins of the Best Interest Clause

The first commissioner of a major professional sports league²¹ arose out of a controversy that threatened the integrity—and perhaps the continued existence of—MLB. The Chicago White Sox faced the Cincinnati Reds in the 1919 World Series and were favored to win; the Reds won the series five games to three.²² Soon thereafter, details emerged that gamblers had bribed eight players from the White Sox to throw the World Series.²³ While there had been rumors of players being involved in gambling in baseball

17. Bukowski, *supra* note 11, at 117; see also NAT'L BASKETBALL ASS'N & NAT'L BASKETBALL PLAYERS ASS'N, COLLECTIVE BARGAINING AGREEMENT art. VI, § 8 (executed July 29, 2005), available at <http://www.nbpa.org/cba/2005> [hereinafter NBA COLLECTIVE BARGAINING AGREEMENT] (requiring players who commit violent acts off the court to possibly undergo counseling, after a clinical evaluation, to address such behavior).

18. See Korin Miller, *Charles Barkley Arrested on Suspicion of DUI*, N.Y. DAILY NEWS, available at Dec. 31, 2008, http://www.nydailynews.com/gossip/2008/12/31/2008-12-31_charles_barkley_arrested_on_suspicion_of.html (referring to Barkley's famous quote "A million guys can dunk a basketball; should they be role models?", which led to Nike's 1993 "I am not a role model" advertising campaign).

19. Holly M. Burch & Jennifer B. Murray, *An Essay on Athletes as Role Models, Their Involvement in Charities, and Considerations in Starting a Private Foundation*, 6 SPORTS LAW. J. 249, 250-55 (1999).

20. Kim & Parlow, *supra* note 5, at 585. Commissioners also require background checks and implement dress codes to help further this role model image. *Id.*

21. It is generally accepted that the four major American professional sports leagues are the NBA, NFL, NHL, and MLB.

22. See Jonathan M. Reinsdorf, *The Powers of the Commissioner in Baseball*, 7 MARQ. SPORTS L.J. 211, 219 (1996).

23. See Robert I. Lockwood, Note, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Back to the Forefront in the NBA*, 15 SPORTS LAW. J. 137, 141-44 (2008).

generally, few thought it would reach the magnitude and significance of throwing a World Series.²⁴ The reality shook the public's confidence in baseball to its core, and the baseball club owners acted swiftly to save baseball.²⁵

The owners decided to consolidate power in the hands of a newly created Commissioner and approached Judge Kenesaw Mountain Landis about the position.²⁶ Landis was willing to accept the position, but only if he possessed unbridled authority.²⁷ The owners needed someone of Landis's integrity and reputation to re-instill the public's confidence in baseball.²⁸ Consequently, the owners drafted a governing document, which would later become the Major League Agreement, detailing the newly created position of Commissioner and the near absolute power that the position enjoyed.²⁹ Landis approved the wording of the document—both with regard to the Commissioner and more generally—and became the first Commissioner of baseball.³⁰

The vast majority of the Commissioner's power stems from his "best interests" power.³¹ The Major League Agreement gave the Commissioner the authority to investigate actions by anyone in baseball that he deemed "detrimental to the 'best interests' of

24. See Reinsdorf, *supra* note 22, at 219-20. The Chicago White Sox team of this era earned the nickname the "Black Sox" due to this infamy. See Paul Finkelman, *Baseball and the Rule of Law*, 46 CLEV. ST. L. REV. 239, 245 (1998).

25. See Reinsdorf, *supra* note 22, at 220.

26. See Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 COLUM. L. REV. 2420, 2430 (1997). Judge Landis was a well known figure to baseball, as he was the presiding judge in the antitrust case, *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922). Due to Landis's efforts, the National League and Federal League negotiated a settlement in the case. See Ted Curtis, *In the Best Interests of the Game: The Authority of the Commissioner of Major League Baseball*, 5 SETON HALL J. SPORT L. 5, 6 (1995). Interestingly, only the National League's Baltimore franchise did not accept the settlement, and thus, the Federal League sued the Baltimore team. This case made its way to the U.S. Supreme Court, and the Court's decision ultimately provided MLB with its antitrust exemption. See generally *Fed. Baseball Club of Baltimore*, 259 U.S. at 200.

27. Shayna M. Sigman, *The Jurisprudence of Judge Kenesaw Mountain Landis*, 15 MARQ. SPORTS L. REV. 277, 304 (2005).

28. Peter G. Neiman, "Root, Root, Root for the Home Team": Pete Rose, Nominal Parties, and Diversity Jurisdiction, 66 N.Y.U. L. REV. 148, 148 n.7 (1991). This did not, however, stop the owners from attempting to limit the powers of the commissioner right before the final drafting session of the document that was to ultimately become the Major League Agreement. The owners attempted to add two clauses that would have limited the Commissioner's otherwise absolute authority. The first clause would have transformed the Commissioner's ability to suspend or remove an owner for actions that were "detrimental to the best interests" of baseball to the mere ability to recommend such a suspension or removal. See Reinsdorf, *supra* note 22, at 223. The second clause would have limited the Commissioner's role to one of a tiebreaker for such issues brought before the Advisory Committee, instead of being able to rule on all matters before the Committee. See *id.* At the final drafting session, Landis threatened to not become commissioner when presented with the owners' proposed changes. The owners quickly relented, and Landis became the Commissioner of baseball, endowed with absolute authority. See *id.*

29. See Reinsdorf, *supra* note 22, at 221.

30. See *id.*

31. See Matthew A. Foote, *Three Strikes and You're (Not Necessarily) Out: How Baseball's Erratic Approach to Conduct Violations Is Not in the Best Interest of the Game*, 6 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 6-7 (2009). Interestingly, the scope of the Commissioner's power—albeit more limited at the time—can actually be seen to have predated the official position of Commissioner. In 1919, the Boston Red Sox sold pitcher Carl Mays to the New York Yankees after he left the field during the middle of the game—without the permission or instruction of his manager or team. See Bukowski, *supra* note 11, at 109. When he caught wind of the sale of Mays, American League President Byron "Ban" Johnson suspended Mays for leaving his team. See *id.* Before the uniting of the leagues under Commissioner Landis, the American and National Leagues had their own presidents that oversaw their respective operations. See *id.* The Yankees challenged Johnson's suspension in *American League Baseball Club of N.Y. v. Johnson*, 179 N.Y.S. 498 (1919), and the court held that Johnson could suspend or otherwise discipline a player only for actions taken during the course of the actual playing of a game.

baseball.”³² Moreover, the commissioner could take “preventative, remedial or punitive action” against those acting against these “best interests.”³³ The Commissioner also served as the final arbiter of disputes arising in baseball—between the league and clubs, between players and clubs, etc.³⁴ To ensure the absolute authority of the Commissioner, the Major League Agreement dictated that all clubs were bound by the Commissioner’s decisions and that they waived the right to challenge such decisions in court, regardless of how severe the penalty imposed.³⁵ While the MLB Commissioner no longer enjoys this type of absolute authority,³⁶ he still has significant power—as do the commissioners in the other major professional sports leagues—to act in the best interest of his sport, including punishing athletes for misbehavior committed off the court or field.

B. Sources of the Best Interest Power in the NBA and NFL

The broad power afforded professional sports league commissioners through the leagues’ respective best interest clauses stems, in large part, from the league constitutions, bylaws, and CBAs.³⁷ Included in these general powers—as described further below—is the power of each league’s commissioner to discipline athletes for inappropriate actions committed off of the court or field.³⁸ These governing documents contractually bind most of the individuals involved in professional sports, as the players (through their union) and

32. See Reinsdorf, *supra* note 22, at 221.

33. See *id.* The Major League Agreement allowed the Commissioner to take punitive measures, such as imposing a \$5,000 fine (not an insignificant amount in 1921) and making a player ineligible to play in the league. See *id.* at 221-22.

34. See Matthew B. Pachman, Note, *Limits on the Discretionary Power of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised by the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1415 (1990).

35. See *id.* Since that time, despite the waiver of the right to recourse in the judicial system, courts have considered cases involving actions taken by the Commissioner pursuant to his best interest power, though only when the Commissioner has exceeded his authority. See Reinsdorf, *supra* note 22, at 222.

36. See generally Reinsdorf, *supra* note 22 (detailing the various amendments to the Commissioner’s power since the adoption of the Major League Agreement); Pachman, *supra* note 34, at 1416-17 (detailing changes made to the powers of the MLB Commissioner over time); Curtis, *supra* note 26, at 12-31.

37. RAY YASSER ET AL., SPORTS LAW CASES AND MATERIALS 379-80 (6th ed., LexisNexis 2006); see also MAJOR LEAGUE BASEBALL CONST. § 2 (amended 2005) (providing the MLB Commissioner with authority to discipline athletes who act in a way that is “not in the best interests of baseball”); NAT’L BASKETBALL ASS’N CONST. & BYLAWS art. XXXV(d) (1989) [hereinafter NBA CONST. & BYLAWS] (enabling the NBA Commissioner to discipline “any Player who, in [the Commissioner’s] opinion, shall have been guilty of conduct prejudicial...or detrimental to the [NBA]”); NAT’L HOCKEY LEAGUE BYLAWS § 17.3(a) (1990) (authorizing the NHL Commissioner to punish an athlete “whether during or outside the playing season has been dishonorable, prejudicial to or against the welfare of the League or the game of Hockey”); NAT’L FOOTBALL LEAGUE CONST. & BYLAWS art. VIII (amended 1999) [hereinafter NFL CONST. & BYLAWS]; NFL MGMT. COUNCIL & NFL PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT app. C, ¶ 15 (2006) [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT] (permitting the NFL Commissioner to punish an athlete who acts in a manner that is “detrimental to the League or professional football”). The NFL Collective Bargaining Agreement grants the Commissioner power to discipline players to protect “the integrity of the sport”—a phrase synonymous to the “best interest of the sport.”

38. See Kim & Parlow, *supra* note 5, at 575; see also MATTHEW J. MITTEN ET AL., SPORTS LAW AND REGULATION 436 (1st ed. 2005) (explaining the commissioners’ power to act in the best interest of their respective sport); Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645 (1999) (analyzing the different professional sports leagues’ commissioners’ best interest powers).

the owners (through the league itself) negotiate and approve these documents.³⁹ In this regard, the interested parties in professional sports construct and bring their actions under the purview of the power of the commissioner. As one scholar notes, the power afforded a commissioner “represents an almost autonomous authority within the internal structure of the league, uncontrolled by its principal owners.”⁴⁰ While MLB was the first to codify the best interest power in the Major League Agreement, the NBA and NFL eventually followed suit, granting their respective commissioners the broad power contained in this type of best interest clause.

The first NBA Commissioner did not enjoy the same broad authority that MLB Commissioner Landis did.⁴¹ Instead, the NBA’s first Commissioner,⁴² Maurice Podoloff, did not have much formal power under the governing league documents.⁴³ In 1964, shortly after the NBA’s second Commissioner took office—Walter Kennedy assumed the role in 1963—the NBPA was formed.⁴⁴ In 1971, the league owners granted the Commissioner a type of broad-reaching best interest power similar to the power enjoyed by the MLB Commissioner.⁴⁵ Some believe that the owners instituted the Commissioner’s best interest power to “preserve the integrity of the league from the perceived evils of gambling.”⁴⁶ There were several instances of problems with gambling and basketball—including the high-profile case, *Molinas v. NBA*⁴⁷ in 1961, which will be discussed below in Part IV—that preceded the vesting of the NBA Commissioner with this best interest power. To exercise his best interest power, the NBA Commissioner did not need a player to violate a league rule.⁴⁸ Instead, the Commissioner could use this power—based on his professional judgment—in a way that he deemed in the best interest of the NBA, limited only by contrary language contained in any of the league’s governing documents or by due process concerns.⁴⁹

39. Ian Dobinson & David Thorpe, *What’s Wrong with the Commissioner? Some Lessons from Downunder*, 19 SETON HALL J. SPORTS & ENT. L. 105, 111-12 (2009).

40. Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65, 72 (1995). As will be discussed in more detail below, courts and arbitrators have placed certain restrictions on commissioners’ seemingly unbridled authority. Moreover, a league’s constitution, bylaws, and/or collective bargaining agreement can also serve to limit the commissioner’s power. See Brian D. Showalter, *Technical Foul: David Stern’s Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS L. J. 205, 206 (2007).

41. See *id.* at 209. The NBA was known as the Basketball Association of America (BAA) at the time Podoloff took office. See *id.*

42. The position at the time was titled “NBA President,” though it later became the NBA Commissioner in 1967. Mike Monroe, *The Commissioners*, NBA.COM, <http://www.nba.com/history/commissioners.html> (last visited Mar. 8, 2010).

43. See Showalter, *supra* note 40, at 209. Nevertheless, Commissioner Podoloff was able to successfully govern by using his influence to advance the league—most significantly, merging the BAA and the National Basketball League to form the NBA. See *id.*

44. *Id.*

45. *Id.* In addition to granting the Commissioner power to act in the best interest of the NBA, the owners gave the Commissioner more authority to manage the league in ways he did not previously enjoy. Lockwood, *supra* note 23, at 149.

46. Lockwood, *supra* note 23, at 147.

47. 190 F. Supp. 241 (S.D.N.Y. 1961).

48. Lockwood, *supra* note 23, at 147.

49. *Id.*

This best interest power survives in the NBA today,⁵⁰ and allows the NBA Commissioner to punish “any Player who, in [the Commissioner’s] opinion, shall have been guilty of conduct prejudicial . . . or detrimental to the [NBA].”⁵¹ This authority permits the NBA Commissioner to discipline players for their behavior off of the court. Moreover, the Commissioner also has another source of supplemental authority that allows him to punish players for off the field transgressions: the standard NBA player contract, which contains a “good moral character” clause.⁵² This clause permits the team to terminate a player’s contract if that player acts in a manner that is not consistent with the standards of good morals and citizenship.⁵³ The NBA Commissioner has also cited this clause in handing down discipline for player misbehavior.⁵⁴ The best interest power and “good moral character” clause have been described as granting the NBA Commissioner “the broadest authority” among the commissioners of the major professional sports leagues.⁵⁵

Like the first NBA Commissioner, the first two NFL Commissioners did not enjoy the expansive best interest power that MLB Commissioner Landis did.⁵⁶ The NFL’s third Commissioner, Pete Rozelle, was granted significant authority, due in part to his tremendous success in bringing financial solvency—and indeed, prosperity—to the league.⁵⁷ The owners gave Rozelle “full, complete, and final jurisdiction and authority over any dispute involving a member or members in the League.”⁵⁸ Rozelle could also punish a player for conduct that he considered “detrimental to the integrity of, or public confidence in, the game of professional football.”⁵⁹ Rozelle enjoyed this power without concerns of arbitration rights afforded the player, which was (and is) the case in other professional sports leagues.⁶⁰

The NFL Commissioner today enjoys a great deal of authority to discipline a player who acts in a manner that the Commissioner deems “to be detrimental to the League or professional football.”⁶¹ However, an implicit limitation seems to exist within the NFL

50. It is worth noting that one significant change to the NBA commissioner’s best interest power has been to afford the players a grievance arbitration—a result that came about through the collective bargaining process. *Id.* at 161.

51. NBA CONST. & BYLAWS art. XXXV, § d. In addition, the NBA Commissioner “is entitled to promulgate and enforce reasonable rules governing the conduct of players on the playing court”—which is very broadly defined. NBA COLLECTIVE BARGAINING AGREEMENT art. VI, § 12, *noted in* Showalter, *supra* note 40, at 212-13. The NBA Commissioner can implement such rules by merely giving notice and consulting with the NBPA; he does not need to receive the organization’s consent. In recent years, Commissioner David Stern has used this broad authority to implement various rules intended to control players’ behavior both on and off the court, such as a dress code for players “engaged in team or league business” and prohibiting players from attending certain nightclubs. Showalter, *supra* note 40, at 210-12.

52. Moser, *supra* note 14, at 75.

53. Bukowski, *supra* note 11, at 110.

54. See Mike Wise, *Pro Basketball: Image Conscious NBA Suspends Iverson and Rider*, N.Y. TIMES, Oct. 4, 1997, at C8.

55. Showalter, *supra* note 40, at 212.

56. See Lockwood, *supra* note 23, at 146.

57. *Id.*

58. *Id.* (citing NFL CONST. & BYLAWS art. VIII, § 8.3(a) (1988)).

59. *Id.* at 147 (citing NFL COLLECTIVE BARGAINING AGREEMENT art. XI, § 1(a) (1993)).

60. *Id.* at 147.

61. NFL CONST. & BYLAWS art. VIII, § E; see also NFL COLLECTIVE BARGAINING AGREEMENT app. C, ¶ 15. For an argument against the NFL Commissioner having the authority to punish players for their actions off of the field under the NFL’s various governing documents, see Marc Edelman, *Are Commissioner Suspensions Really Any Different From Illegal Boycotts? Analyzing Whether the NFL Personal Conduct Policy Illegally Restrains*

League Constitution, as Article VIII, Section 8.13(B) requires the NFL Commissioner to secure the approval of the NFL Executive Committee in order to impose discipline beyond his express authority.⁶² Nevertheless, this otherwise broad grant of authority affords the Commissioner great latitude in punishing players for transgressions—a power reinforced by the NFL CBA and the NFL’s standard player contract.⁶³ In addition, similar to those powers afforded Rozelle, the NFL’s current Commissioner, Roger Goodell, is not limited by an arbitration provision the way other professional sports league commissioners are with regard to their discipline and punishment of players.⁶⁴ Instead, players can only appeal the Commissioner’s disciplinary measures to the commissioner or his designee.⁶⁵

Even though Goodell enjoys this distinction, he chose to collaborate with the NFL Players’ Association when developing the NFL Personal Conduct Policy (NFL PCP),⁶⁶ which grants him another supplemental source of authority for disciplining athletes.⁶⁷ The NFL PCP provides that “[a]ll persons associated with the NFL are required to avoid ‘conduct detrimental to the integrity and public confidence in the National Football League.’”⁶⁸ This type of detrimental conduct includes sexual offenses, domestic violence, crimes related to steroids or other banned substances, dangerous activity that puts others’ safety at risk, possessing a weapon in a workplace setting, and “conduct that undermines or puts at risk the integrity and reputation of the NFL.”⁶⁹ In fact, a player acting in such a

Trade, 58 CATH. U. L. REV. 631, 638 (2009).

62. Michael A. Mahone, Jr., *Sentencing Guidelines for the Court of Public Opinion: An Analysis of the National Football League’s Revised Personal Conduct Policy*, 11 VAND. J. ENT. & TECH. L. 181, 191 (2008); see also Pachman, *supra* note 34, at 1418 (labeling this provision as a “significant departure” from the MLB Commissioner).

63. See NFL COLLECTIVE BARGAINING AGREEMENT app. C, ¶ 15, (permitting the NFL Commissioner to punish an athlete who acts in a manner that is “detrimental to the League or professional football”); see also Mahone, Jr., *supra* note 62, at 191-92.

64. See Lockwood, *supra* note 23, at 147.

65. See NFL COLLECTIVE BARGAINING AGREEMENT art. XI, §1 (stating that any discipline “may only be affirmed, reduced, or vacated by the commissioner”).

66. See NFL PLAYERS ASS’N, PERSONAL CONDUCT POLICY (2008), available at <http://www.nflplayers.com/about-us/Rules--Regulations/Player-Policies/Conduct-Policy/> [hereinafter NFL PCP]. While a previous NFL PCP came into existence in 2000—when the owners unilaterally gave then-NFL Commissioner Paul Tagliabue the explicit authority to punish players for transgressions committed off the playing field—Commissioner Tagliabue never exercised his authority under it. See Edelman, *supra* note 61, at 637. Moreover, the new version of the NFL PCP includes “longer suspensions, indefinite suspensions, and even the commissioner’s right to suspend players for non-criminal behavior.” See *id.* This difference, coupled with the manner in which the current version of the NFL PCP came to being—that is, through Commissioner Goodell’s consultation with the NFLPA instead of being unilaterally imposed by the NFL owners—makes the new PCP distinct (for purposes of this article) from the previous version.

67. Adam B. Marks, *Personnel Foul on the National Football League Players Association: How Union Executive Director Gene Upshaw Failed the Union’s Members By Not Fighting the Enactment of the Personal Conduct Policy*, 40 CONN. L. REV. 1581, 1584-85 (2008) (recounting the history of the development of the NFL PCP). The NFL PCP replaced the NFL’s Violent Crime Policy—instituted in 1998—which allowed the NFL Commissioner to suspend and/or fine players charged with violent crimes. See Robert Ambrose, *The NFL Makes It Rain: Through Strict Enforcement of Its Policy, the NFL Protects Its Integrity, Wealth, and Popularity*, 34 WM. MITCHELL L. REV. 1069, 1086-87 (2008). The NFL Violent Crime Policy also required a wayward player to engage in counseling and a clinical evaluation. See Bukowski, *supra* note 11, at 110.

68. See NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 1.

69. *Id.* at 2. Commissioner Goodell has suspended players under the NFL PCP for actions such as probation violations, alleged involvement in dog fighting (which the player, Michael Vick, later pled guilty to related criminal charges), and being the focus of a police investigation. See Marks, *supra* note 67, at 1583-84.

manner will be found in violation of the NFL PCP, even if the player's actions do not result in a criminal conviction.⁷⁰

While the NFL PCP provides the NFL Commissioner with an additional source of authority for disciplining players for their misconduct, the document also contains a proportionality requirement.⁷¹ The NFL PCP provides that "[t]he specifics of the disciplinary response will be based on the nature of the incident, the actual or threatened risk to the participant and others, any prior or additional misconduct (whether or not criminal charges are filed), and other relevant factors."⁷² In this regard, whatever punishment the NFL Commissioner imposes—which can include a fine, suspension, banishment, counseling, or other education programs—must be proportional to the player's actions.⁷³ In addition, a disciplined athlete retains his right to appeal as provided in Article XI of the NFL Collective Bargaining Agreement and the NFL Constitution and Bylaws.⁷⁴

Based on the best interest provisions contained in each league's constitution and bylaws, and the other supplemental sources of authority, the NBA and NFL Commissioners have broad authority to discipline players for their conduct off the court or field. However, as discussed further in Part IV, while courts have given commissioners' actions great deference, arbitrators have shown less deference in their treatment of commissioner punishment.

IV. COURTS' AND ARBITRATORS' TREATMENT OF COMMISSIONER PUNISHMENT OF ATHLETES

Given the broad power granted to commissioners under the professional sports leagues' respective best interest clauses, it is instructive to analyze the treatment of their powers by courts and arbitrators. Whether an athlete disciplined by the commissioner may appeal to an arbitrator, court, or the commissioner himself depends upon which league he is in.⁷⁵ Courts' treatment of commissioners' actions under the best interest clause of his respective league's governing documents seems to continue the original intent of this authority being plenary in nature.⁷⁶ On the other hand, arbitrators have been far more likely to reduce commissioner-imposed punishment—particularly based on a proportionality standard—which limits the expansive best interest power of the commissioners.

70. See NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 1.

71. Some scholars have challenged the validity and legal relevance of the NFL PCP, especially given its uncertain relationship to the NFL's other governing documents. See Edelman, *supra* note 61, at 638; Marks, *supra* note 67, at 1593-98. In particular, such critics cite the fact that the NFL PCP was not collectively bargained for, and instead, was unilaterally implemented by Commissioner Goodell—though only after consulting with, and receiving the support of, the NFLPA. See Marks, *supra* note 67, at 1581. However, to date, the NFL PCP has not been successfully challenged, and Commissioner Goodell has acted consistent with the analysis of his powers under the document as described above. Nor has the NFLPA taken any action when its players were fined or suspended. See *id.* at 1584-85.

72. NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 2.

73. See *id.*

74. See NFL PERSONAL CONDUCT POLICY, *supra* note 66, at 3. Of course, a player's right of appeal is to the Commissioner, who is the person who issued the punishment in the first place.

75. See Pollack, *supra* note 38, at 1648-49 (discussing the differences in players' right of appeal in the major professional sports leagues).

76. See Wm. David Cornell, Sr., *The Imperial Commissioner Landis and His Progeny: The Evolving Power of Commissioners Over Players*, 40 NEW ENG. L. REV. 769, 772 (2006).

A. Deference to the Commissioner: The Court Cases

Most court cases involving commissioners' best interest powers do not involve a commissioner using his best interest power to discipline an athlete for misbehavior off the court or field. Nevertheless, those cases that have, and those cases involving the commissioner exercising his best interest authority in other contexts, demonstrate the likelihood that courts will continue to defer to, and uphold, discipline imposed by a commissioner against wayward players.

B. The Commissioner Usually Prevails

Early in the history of the best interest clause in professional sports, the Milwaukee American Association brought suit against MLB Commissioner Landis challenging his best interest authority.⁷⁷ The dispute arose when the St. Louis Cardinals sent outfielder Fred Barnett—after several reassignments and optionings—to Milwaukee of the minor league American Association, while reserving the option to recall him back to the major league team.⁷⁸ MLB rules mandated that teams had to first place a player on waivers—allowing other clubs the opportunity to sign that player—before sending him down to the minor leagues.⁷⁹ However, an exemption existed for teams that had purchased a player outright for two years; the team would not need to place a player on waivers before sending him down to a minor league club.⁸⁰ In this case, the minor league club located in Wichita Falls had sold Barnett to St. Louis for \$5,000—despite an offer of \$10,000 from the Pittsburgh Pirates.⁸¹ Commissioner Landis investigated and found that while St. Louis owner Phil Ball's ownership interest in the four teams that Barnett had been transferred back and forth between did not violate the Major League Agreement, it did allow Ball to keep the two-year waiver exemption on Barnett intact, thus keeping the player under his control and subverting the spirit of the waiver rule.⁸² Accordingly, Commissioner Landis exercised his best interest authority by voiding Barnett's option to Milwaukee and requiring that Barnett either be returned to St. Louis and remain on the team for at least one year, transferred to another team not owned or controlled by St. Louis, or released unconditionally.⁸³ Ball filed suit claiming that Commissioner Landis did not have the authority to act in this manner. The court held in favor of the Commissioner, noting that "the commissioner is given almost unlimited discretion in the determination of whether or not a certain state of facts creates a situation detrimental to the national game of baseball."⁸⁴ This early case set the precedent,

77. See *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

78. See *id.* at 299-300. Milwaukee and the other teams to which Barnett had been reassigned or optioned were either owned or controlled by the St. Louis club. See *id.*

79. See Curtis, *supra* note 26, at 10.

80. See *Milwaukee Am. Ass'n*, 49 F.2d at 301.

81. See *id.* at 300.

82. See *id.* at 302. The four clubs that Ball had an ownership interest in were located in St. Louis, Tulsa, Wichita Falls, and Milwaukee.

83. Curtis, *supra* note 26, at 11.

84. See *Milwaukee Am. Ass'n*, 49 F.2d at 303. The court enumerated a variety of circumstances that fell within the Commissioner's broad authority: "to keep the game of baseball clean, to promote clean competition, to prevent collusive or fraudulent contracts, to protect players' rights, to furnish them with full opportunity to advance in accord with their abilities and to prevent their deprivation of such opportunities by subterfuge, covering or other unfair conduct." *Id.*

which has been followed by many subsequent courts, to give a high level of deference to commissioner actions pursuant to the respective league's best interest clause.⁸⁵

A second instructive case did not involve the best interest clause—it predated the inclusion of such a clause in the NBA's governing documents—but is nevertheless relevant, as it demonstrates a similar deference to the NBA Commissioner to act in the best interests of the sport even without such a clause. In *Molinas v. NBA*,⁸⁶ NBA President Podoloff indefinitely suspended Jack Molinas for betting on his team, the Fort Wayne Pistons.⁸⁷ Molinas filed suit seeking an injunction to set aside his suspension and allow him to continue playing in the NBA.⁸⁸ Molinas claimed that he was not given notice and a hearing before being suspended and that the NBA President had no authority suspend him indefinitely.⁸⁹ The court upheld Podoloff's actions, explaining that the elimination of gambling from the NBA was an important justification for imposing such a punishment.⁹⁰

In *Charles O. Finley & Co. v. Kuhn*,⁹¹ the Seventh Circuit Court of Appeals afforded MLB Commissioner Bowie Kuhn a similar level of deference to that given Commissioner Landis in *Milwaukee American Association*. In the case, Oakland Athletics owner Charles Finley had attempted to sell the contracts of Vida Blue, Rollie Fingers, and Joe Rudi—all-star players that the team could not afford to resign when their contracts expired at the end of the season.⁹² Citing his best interest authority, Commissioner Kuhn blocked the sale of these players' contracts.⁹³ Commissioner Kuhn reasoned that allowing the sale of such contracts to stand would jeopardize the integrity of the game and the public's confidence in it.⁹⁴ The court upheld Commissioner Kuhn's denial of the attempted sale of the players' contracts, relying on the best interest clause. In particular, the court noted that the MLB Commissioner "has been given broad power in unambiguous language," and traced the amendments to the Major League Agreement to demonstrate that this broad authority is what the owners intended.⁹⁵

Finally, the court in *Atlanta National League Baseball Club, Inc. v. Kuhn*⁹⁶ again afforded the MLB Commissioner great deference in acting pursuant to his best interest powers. In the case, San Francisco Giants star outfielder Gary Matthews was planning to become a free agent when his contract expired at the end of the 1976 season.⁹⁷ At the time,

85. This case was in stark contrast to precedent predating Commissioner Landis's tenure. For example, in *American League Baseball Club of N.Y. v. Johnson*, 179 N.Y.S. 498 (N.Y. Sup. Ct. 1919), the court held that the three-person governing entity of the league—the National Commission—did not have the power to discipline a player for breaking his contract with a team because the player's actions were not in the performance of his duties. *See id.* at 501-02. In reading the National Commission's powers so narrowly, the court limited the scope of the disciplinary power of the governing entity of the league to only those actions that players took on the field. *See id.* at 504.

86. 190 F. Supp. 241 (S.D.N.Y. 1961).

87. *Id.* at 242.

88. *Id.*

89. *See* Jeffrey Standen, *The Beauty of Bets: Wagers as Compensation for Professional Athletes*, 42 WILLAMETTE L. REV. 639, 645 n.30 (2006).

90. *Molinas*, 190 F.Supp. at 244.

91. 569 F.2d 527 (7th Cir. 1978).

92. *See id.* at 530-31.

93. *See id.* at 531.

94. *Id.*

95. *Id.* at 534.

96. 432 F. Supp. 1213 (N.D. Ga. 1977).

97. Lewis Kurlantzick, *The Tampering Prohibition and Agreements Between American and Foreign Sports*

the team who most recently had a player under contract retained exclusive rights to negotiate with that player.⁹⁸ On October 20, 1976, Atlanta Braves owner Ted Turner made a comment to San Francisco Giants owner Bob Lurie—in front of several members of the media—that he “would do anything to get Gary Matthews and that he would go as high as he had to.”⁹⁹ These comments then appeared in the next day’s newspaper in San Francisco, and Lurie filed a complaint with MLB Commissioner Bowie Kuhn shortly thereafter.¹⁰⁰ Commissioner Kuhn determined that Turner was violating MLB’s tampering rules and suspended him for one year.¹⁰¹ Turner filed suit seeking to enjoin the Commissioner from taking such action.¹⁰² The court upheld Commissioner Kuhn’s actions, finding “ample authority to punish plaintiffs in this case, for acts considered not in the best interests of baseball.”¹⁰³ The court in this case, as those before it, recognized an almost unbridled power that flowed to the Commissioner through the best interest clause and accorded the Commissioner great deference in acting pursuant to it.

C. Cases Where the Commissioner Failed

However, not all court cases have demonstrated this type of deferential treatment of commissioners’ exercise of their best interest powers. For example, in *Riko Enterprises, Inc. v. Seattle Supersonics Corp.*,¹⁰⁴ the court held that the NBA Commissioner did not have the authority to penalize a team for violating the NBA constitution by transferring the team’s draft pick that year to another team.¹⁰⁵ In the case, the then-Seattle Supersonics¹⁰⁶ negotiated a contract with former NBA player John Brisker, who had previously been playing in the rival American Basketball Association (ABA) despite the fact that the Philadelphia 76ers owned his sole negotiating rights.¹⁰⁷ The NBA Commissioner found that the Supersonics had violated the NBA constitution—specifically, the “simple principle of fair play”—fined them \$10,000, and gave the team’s first round draft pick to the 76ers.¹⁰⁸ The Commissioner pointed to his best interest power in justifying this punishment.¹⁰⁹ However, the court disagreed, finding that the Commissioner had exceeded his authority by forcing the Supersonics to forfeit their draft pick.¹¹⁰ The court held that only the NBA’s

Leagues, 32 COLUM. J.L. & ARTS, 271, 290-91 (2009).

98. *Id.* at 291.

99. *Kuhn*, 432 F. Supp. at 1217.

100. *Id.*

101. *Id.*

102. *See id.* at 1218.

103. *Id.* at 1220.

104. 357 F. Supp. 521 (S.D.N.Y. 1973).

105. *See id.* at 525.

106. In 2008, after a dispute with the City of Seattle, the owner of the Seattle Supersonics moved to Oklahoma City and the team became known as the Oklahoma City Thunder. *See* Greg Johns & Angela Galloway, *Sonics are Oklahoma-Bound*, SEATTLE POST-INTELLIGENCER, July 3, 2008, http://www.seattlepi.com/basketball/369313_trial03.html.

107. *See Riko*, 357 F. Supp. at 522. Although they were a rival league at the time, the ABA later merged with the NBA. *See* Thane N. Rosenbaum, *The Antitrust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era*, 41 U. MIAMI L. REV. 729, 771 n.180 (1987).

108. *See Riko*, 357 F. Supp. at 523.

109. *See id.* at 525.

110. *See id.* at 524-25. The court also seemed displeased by the Commissioner’s refusal to conduct a hearing to allow the Supersonics an opportunity to address the charges against them—this was particularly egregious in the court’s mind, given that the Commissioner was acting as arbitrator for the dispute. *See* Celeste M. Hammond, *The*

board of directors had the authority under the NBA's constitution to impose the punishment of denying a team their draft pick.¹¹¹ In this regard, the court found that the Commissioner's best interest authority was not as expansive as other courts, discussed above, had determined.

Another case that stands out as not following the deferential line of cases described above is *Professional Sports, Ltd. v. Virginia Squires Basketball Club, Ltd.*¹¹² In the case, the San Antonio Spurs had attempted to purchase the contract of star player George Gervin from the Virginia Squires for \$225,000.¹¹³ The ABA Commissioner refused to allow the sale, pointing to ABA bylaws that allowed the Commissioner to arbitrate and settle disputes between league clubs related to player contracts.¹¹⁴ The court acknowledged that while the Commissioner had the authority to settle disputes between clubs, no dispute existed in this matter, since the clubs were in agreement on the terms of the sale of Gervin's contract.¹¹⁵ The court thus held that the Commissioner's authority did not extend to disputes that were created by the Commissioner himself, as was the case here.¹¹⁶ The court also rejected the Commissioner's reliance on his best interest power because he took action without providing notice and a hearing.¹¹⁷

The case of Pete Rose also provides an interesting example of when a court has ruled against a commissioner's best interest power. In 1989, after receiving information about Rose's alleged gambling—including on MLB games—Commissioner Bart Giamatti instructed his chief investigator to look into, and report on, the allegations.¹¹⁸ Based on his chief investigator's report that Rose had indeed bet on MLB games, Commissioner Giamatti told Rose that Giamatti himself would investigate the allegations based on his best interest authority and scheduled a hearing to discuss the investigation.¹¹⁹ Rose demanded that Commissioner Giamatti recuse himself, alleging that the Commissioner had already prejudged his guilt.¹²⁰ When the Commissioner refused to do so, Rose filed suit seeking to enjoin against Commissioner Giamatti from holding the hearing.¹²¹ The court granted Rose a temporary injunction—delaying MLB's ability to hold a hearing for at least a few weeks—on the basis that the Commissioner had prejudged Rose.¹²² While Commissioner Giamatti and Rose agreed to a resolution of their dispute—where the Commissioner suspended Rose for life but allowed him to be eligible to apply for reinstatement after one year, and in turn, Rose dropped his lawsuits against the Commissioner—the case demonstrated another situation where a court ruled against a commissioner despite his acting pursuant to the best interest clause.¹²³

(Pre) (As) Sumed "Consent" of Commercial Binding Arbitration Contracts: An Empirical Study of Attitudes and Expectations of Transactional Lawyers, 36 J. MARSHALL L. REV. 589, 593-94 (2003).

111. See *Riko*, 357 F. Supp. at 525.

112. 373 F. Supp. 946 (W.D. Tex. 1974).

113. See *id.* at 948.

114. See *id.* at 949.

115. See Mitchell Nathanson, *The Sovereign Nation of Baseball: Why Federal Law Does Not Apply to "America's Game" and How It Got That Way*, 16 VILL. SPORTS & ENT. L.J. 49, 82-83 (2009).

116. See *Prof'l Sports*, 373 F. Supp. at 950.

117. See *id.* at 951.

118. See Curtis, *supra* note 26, at 27.

119. See *id.*

120. See *id.*

121. See *id.*

122. See *id.* at 27-28.

123. See *id.* at 28.

Finally, the *Chicago National League Ball Club v. Vincent*¹²⁴ case is also demonstrative of courts' refusal to grant deference to a commissioner when his actions exceed the scope of his authority. In the case, the MLB owners voted 10-2 in favor of correcting certain geography issues that had arisen over the decades of MLB expansion and team relocations by realigning four teams in the National League.¹²⁵ Under the realignment plan, the Chicago Cubs and St. Louis Cardinals would move from the National League Eastern Division to the National League Western Division, and the Atlanta Braves and the Cincinnati Reds from the National League Western Division to the National League Eastern Division.¹²⁶ However, the Chicago Cubs exercised their veto right under the MLB Constitution to block the realignment.¹²⁷ MLB Commissioner Fay Vincent stepped in and unilaterally decided to realign some of the teams in the National League, including moving the Cubs to the National League Western Division.¹²⁸ The Cubs filed suit seeking an injunction against the Commissioner's realignment plan, and the court granted the injunction.¹²⁹ The court noted that the Commissioner's best interest power, though expansive, was limited by Article VII of the Major League Agreement, which provided an express means for resolution with regard to the voting provisions in the National League Constitution.¹³⁰ Soon after the parties settled the dispute, Commissioner Vincent resigned under pressure from the owners.¹³¹

These cases demonstrate that while some courts are willing to give commissioners great deference when they act according to their best interest powers, others will overturn commissioners' actions if they exceed the scope of their authority. This theme is even more prevalent in the arbitration decisions involving commissioner actions pursuant to their best interest power.

D. Limitations on Commissioners' Power: The Arbitration Decisions

Commissioners have not been afforded the same level of deference by arbitrators that they have by the courts. The Steve Howe case is illustrative. MLB Commissioner Vincent suspended the oft-troubled Steve Howe for life when he entered an *Alford* plea to charges of possessing and attempting to purchase cocaine—constituting his seventh recreational drug violation since he began his professional baseball career.¹³² Howe had been suspended for each of his previous violations and had even avoided a lifetime suspension on his sixth offense when Commissioner Vincent—who replaced Commissioner Kuhn—reinstated Howe under rigid conditions that focused on Howe attending an ongoing drug rehabilitation

124. No. 92-C-4398, 1992 U.S. Dist. LEXIS 11033 (N.D. Ill. July 23, 1992), *excerpted in* PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW* 1, 28-32 (2004), *withdrawn and vacated*, 1992 U.S. Dist. LEXIS 14948 (N.D. Ill. Sept. 24, 1992) (after the parties agreed to settle the dispute).

125. See Murray Chass, *Newly Empowered Owners Rescind Order to Realign*, N.Y. TIMES, Sept. 25, 1992, <http://www.nytimes.com/1992/09/25/sports/baseball-newly-empowered-owners-rescind-order-to-realign.html?pagewanted=1>.

126. See *id.*

127. See Curtis, *supra* note 26, at 29-30.

128. See Michael J. Willis, *Protecting the "Owners" of Baseball: A Governance Structure to Maintain the Integrity of the Game and Guard the Principals' Money Investment*, 88 NW. U. L. REV. 1619, 1621-22 (1994).

129. See Lydia Lavelle, *From the Diamonds to the Courts: Major League Baseball v. the Commissioner*, 21 N.C. CENT. L.J. 97, 114-17 (1995).

130. *Id.* at 115-16.

131. See Depak Sathy, *Reconstruction: Baseball's New Future*, 4 SETON HALL J. SPORT L. 27, 61 (1994).

132. See Pollack, *supra* note 38, at 1692-93.

program.¹³³ The Players' Association, on behalf of Howe, filed a grievance with the MLB arbitrator challenging Howe's lifetime suspension after his seventh offense.¹³⁴ The arbitrator reduced Howe's punishment to a one year suspension and a strict drug-testing program, stating that the severity of Commissioner Vincent's discipline was "without just cause."¹³⁵ The arbitrator recognized the importance of keeping illegal drugs out of the sport of baseball, but he also found that Commissioner Vincent's actions went beyond the reasonable range of discretion given the Commissioner regarding drug offenses.¹³⁶ This was particularly so, reasoned the arbitrator, given that he viewed the punishment as exceeding the severity of Howe's drug violations, especially factoring in Howe's history of mental illness.¹³⁷ This proportionality theme has arisen in several arbitration decisions involving commissioner action pursuant to the best interest clause and serves as a distinct limitation to that power, at least in the arbitration forum.

Arbitrators in the NBA have also treated the commissioner's decisions with less deference than courts have. For example, then-Golden State Warriors star Latrell Sprewell assaulted coach P.J. Carlesimo during practice on December 1, 1997, and was suspended by NBA Commissioner Stern for one year.¹³⁸ Sprewell appealed the Commissioner's punishment to an arbitrator, who reduced the suspension from eighty-two games—one full season—to sixty-eight games (the remainder of that NBA season).¹³⁹ In explaining his decision, the arbitrator pointed to the proportionality theme discussed above. He stated that the year-long suspension exceeded the seriousness of Sprewell's ill-advised action; thus, the punishment did not match the transgression when viewed in light of the circumstances.¹⁴⁰ In this regard, though the reduction was not that significant—less than twenty percent of the original punishment meted out by Commissioner Stern—the case marked yet another instance of an arbitrator affording a commissioner less deference in the exercise of his best interest power.

Finally, the case involving former MLB pitcher John Rocker offers an example of an arbitrator considering the MLB Commissioner's disciplining of a player for actions committed off the field, pursuant to his best interest power.¹⁴¹ As part of his feud with New York baseball fans, Rocker made racist, homophobic, and other insensitive comments to a *Sports Illustrated* reporter.¹⁴² MLB Commissioner Bud Selig responded with a series of disciplinary measures: suspending Rocker from the beginning of MLB's 2000 spring training through games played up until May 1, 2000; mandating that Rocker pay \$20,000 to the National Association for the Advancement of Colored People (NAACP) or another

133. *See id.*

134. *See* Major League Baseball Players Ass'n v. Comm'r of Major League Baseball (Steve Howe Arbitration Decision), *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2000 VOL. 1, at 579, 582-83 (PLI Intellectual Prop., Course Handbook Series No. G-591, 2000).

135. *Id.* at 583.

136. *See id.* at 626, 631.

137. *See id.* at 626-31.

138. Nat'l Basketball Players Ass'n *ex rel.* Sprewell v. Warriors Basketball Club, *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2000 VOL. 1, at 469, 481-82 (PLI Intellectual Prop., Course Handbook Series No. G-591, 2000).

139. *Id.* at 574.

140. *See id.*

141. *See* Major League Baseball Players Ass'n v. Comm'r of Baseball (John Rocker Arbitration Decision) *in* UNDERSTANDING BUSINESS AND LEGAL ASPECTS OF THE SPORTS INDUSTRY 2001 VOL. 1, at 765 (PLI Intellectual Prop., Course Handbook Series No. G-638, 2001).

142. *See id.* at 769.

organization devoted to promoting diversity; and requiring Rocker to attend a diversity sensitivity and training program.¹⁴³ The Players' Association, on behalf of Rocker, filed a grievance with the MLB arbitrator challenging Commissioner Selig's punishment.¹⁴⁴ Despite Rocker's protestations, the arbitrator recognized the Commissioner's authority—through the best interest clause—to punish a player for actions the athlete committed off the field that were speech-related and concerned non-criminal behavior.¹⁴⁵ The arbitrator, however, did not find the Commissioner's best interest power to be unlimited. Instead, the arbitrator stated that while the Commissioner has a "reasonable range of discretion," the punishment dispensed must be on par with the offense committed, considering the circumstances involved.¹⁴⁶ Given this standard, the arbitrator found Rocker's punishment to be excessive and reduced Rocker's suspension to fourteen games and his fine to \$500.¹⁴⁷ In particular, the arbitrator noted that precedent in the Commissioner's punishment of wayward players made Rocker's punishment stand out. In the past, the Commissioner had imposed discipline equal to or greater than Rocker's only in cases of repeat drug offenders committing additional, serious drug violations.¹⁴⁸ Recognizing this context, the arbitrator found no convincing explanation as to why Rocker's punishment should rise to the same level and thus held that the punishment did not meet the requisite proportionality requirement.¹⁴⁹

These cases demonstrate that commissioners have not fared as well in arbitration as they have in the courts, with regard to having their actions taken pursuant to their respective best interest clause—in particular, disciplinary measures—upheld on appeal. However, though less deferential, these cases still show that commissioners have broad best interest powers to discipline athletes for their misbehavior off the court or field. This still significant, though not unlimited, power becomes even more relevant for the NBPA and the NFLPA when considered in light of the protections it receives through the collective bargaining process.

E. The Collective Bargaining Process and the Power of the Commissioner

As one scholar notes, "[w]hile the constitution of a league may purport to give its commissioner unlimited authority to impose discipline, that authority may be curtailed or subject to outside review as a result of the collective bargaining process and provisions incorporated into the collective bargaining agreement."¹⁵⁰ Indeed, "[w]hile the League Constitution will provide helpful guidance in interpreting the commissioner's authority, the CBA is the 'supreme governing authority' concerning employment" in professional sports leagues.¹⁵¹ These observations underscore the importance of the collective bargaining process in defining the parameters of the commissioner power—including the power to

143. See *id.* at 770. Rocker was required to fulfill all aspects of the punishment before he would be allowed to play again.

144. See *id.* at 769.

145. See *id.* at 802-03.

146. See *id.* at 804.

147. See Major League Baseball Players Ass'n, *supra* note 141, at 805-06. The arbitrator did, however, leave the diversity sensitivity and training program requirement intact.

148. See *id.* at 805.

149. See *id.*

150. Jan Stiglitz, *Player Discipline in Team Sports*, 5 MARQ. SPORTS L.J. 167, 171-72 (1995).

151. Mahone, Jr., *supra* note 62, at 192.

discipline players. Moreover, this importance is only amplified given the special legal protections provided CBAs, as described further below.

The National Labor Relations Act (NLRA) provides for the collective bargaining process that allows the respective leagues' owners and players' unions to negotiate the rules and regulations of the relationship between the two sides.¹⁵² In the seminal case *American League of Prof'l Baseball Clubs v. Ass'n of National Baseball League Umpires*,¹⁵³ the National Labor Relations Board (NLRB) established its jurisdiction over professional sports leagues.¹⁵⁴ Despite a string of cases holding that MLB was not engaged in interstate commerce,¹⁵⁵ the NLRB held that Congress intended for the NLRA to apply to MLB.¹⁵⁶ In doing so, the NLRB applied the NLRA to professional sports, allowing players to unionize and the players' union to negotiate the terms of employment and other related subjects for their members through the collective bargaining process.¹⁵⁷

Due to this case, certain requirements of the collective bargaining process must be met to protect the validity of the resultant CBA, and indeed, the longevity and strength of professional sports leagues. For example, the substance of the negotiations between the respective league and the players' union must include certain mandatory subjects of collective bargaining, including hours, wages, and working conditions.¹⁵⁸ For professional sports leagues, the power of the commissioner is a mandatory subject of collective bargaining.¹⁵⁹ Disciplinary measures and grievance procedures are also mandatory subjects

152. 29 U.S.C. § 151-169 (originally enacted in 1935); see also 29 U.S.C. § 159(d) ("to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to . . . confer in good faith with respect to wages, hours, and other terms and conditions of employment").

153. *Am. League of Prof'l Baseball Clubs v. Ass'n of Nat'l Baseball League Umpires*, 180 NLRB 190 (1969).

154. See *id.* at 191.

155. See *Fed. Baseball Club of Baltimore, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200 (1922); *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953); *Flood v. Kuhn*, 407 U.S. 258 (1972).

156. See *Am. League of Prof'l Baseball Clubs*, 180 NLRB at 191. Indeed, the NLRB scoffed at this notion, originally established in *Fed. Baseball Club of Baltimore, Inc.*, and subsequently upheld on *stare decisis* grounds in *Toolson* and *Flood*. In this regard, the NLRB acted in a manner consistent with what the U.S. Supreme Court acknowledged was the case, but which it refused to establish by overturning precedent. See Joshua M. Kimura, *The Return of the Natural: How the Federal Government Can Ensure that Roy Hobbs Outlasts Barry Bonds in Major League Baseball*, 16 SPORTS LAW. J. 111, 135 (2009). However, the Supreme Court had previously held that other professional sports were engaged in interstate commerce. See *Radovich v. Nat'l Football League*, 352 U.S. 445, 451-52 (1957). Interestingly, before that decision, the NFL had refused to bargain with the NFLPA; when faced with the threat of an antitrust lawsuit after *Radovich*, the league started negotiating with the NFLPA through collective bargaining. See Marks, *supra* note 67, at 1587.

157. Melanie Aubut, *When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap Systems*, 10 SPORTS LAW. J. 189, 191-92 (2003). Like other employee unions, players' unions are established when (1) the union can demonstrate a substantial allegiance among the players; (2) the union petitions the NLRB to hold a secret ballot election; and (3) if the union garners a majority of the players' votes, the NLRB certifies the union as the exclusive bargaining agent of all of the players. See Laura J. Cooper, *Privatizing Labor Law: Neutrality/Card Check Agreements and the Role of the Arbitrator*, 83 IND. L.J. 1589, 1589 (2008). As the exclusive representative of the players, the union has a duty of fair representation that ensures the union represents all of its members "fairly, impartially, and in good faith." See Stiglitz, *supra* note 150, at 173 (citing *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192, 204 (1944)).

158. Michael J. Redding & Daniel R. Peterson, *Third and Long: The Issues Facing the NFL Collective Bargaining Agreement Negotiations and the Effects of an Uncapped Year*, 20 MARQ. SPORTS L. REV. 95, 98 (2009).

159. See Note, *Out of Bounds: Professional Sports Leagues and Domestic Violence*, 109 HARV. L. REV. 1048, 1061 (1996) [hereinafter *Out of Bounds*]. Other mandatory subjects for collective bargaining in professional sports include free agency, the draft, salary caps, grievances, club discipline, the standard players' contract, base

in a typical professional sports league's CBA.¹⁶⁰ If the league or the players' union refuses to negotiate on a mandatory subject of collective bargaining, or if the commissioner unilaterally implements a mandatory subject, such circumstances constitute a violation of the duty to collectively bargain and results in an unfair labor practice.¹⁶¹ However, a commissioner can make unilateral changes that do not affect the "wages, hours, and other conditions of employment."¹⁶² Both sides are also required to negotiate in good faith.¹⁶³ Finally, the collective bargaining must be conducted through bona fide, arms-length negotiations.¹⁶⁴ Assuming these requirements are met, and the two sides can reach an agreement, this negotiation process usually leads to a finalized CBA.¹⁶⁵

The CBA is significant for numerous reasons, generally and specifically to professional sports leagues and the power of a commissioner. More generally, CBAs—and the included terms and conditions of employment—enjoy special protection from antitrust laws. As one scholar has noted, "[t]here is an inherent conflict between labor laws and antitrust laws."¹⁶⁶ Labor laws aim to further collective bargaining and agreement between unions and multi-employer bargaining units.¹⁶⁷ Labor laws seek this process because of an underlying belief that without collective action—through unionization and collective bargaining—workers will be unable to obtain fair market value for their services.¹⁶⁸ Therefore, labor law statutes "were enacted to enable collective action by union members to achieve wage levels that are higher than would be available on the free market."¹⁶⁹ On the other hand, antitrust laws prohibit restraint on trade or commerce, including in labor markets, because of the underlying belief that collusion among competing businesses creates pricing and market conditions that hurt consumers.¹⁷⁰

salaries, and other related topics. See, e.g., Christian Dennie, *From Claret to Mayo: The Antitrust Labor Exemption Argument Continues*, 8 TEX. REV. ENT. & SPORTS L. 63, 72 (2007) (surveying some of the mandatory subjects of collective bargaining); see generally Ryan T. Dryer, *Beyond the Box Score: A Look at Collective Bargaining Agreements in Professional Sports and Their Effect on Competition*, 2008 J. DISP. RESOL. 267 (2008) (providing an overview of some of the key terms of collective bargaining in professional sports). There are also non-mandatory subjects of collective bargaining that the two sides can choose to discuss and whether or not to negotiate. See James Gray Pope, *Class Conflicts of Law II: Solidarity, Entrepreneurship, and the Deep Agenda of the Obama NLRB*, 57 BUFF. L. REV. 653, 681 (2009).

160. See Stiglitz, *supra* note 150, at 168-69.

161. See Showalter, *supra* note 40, at 218.

162. Colin J. Daniels & Aaron Brooks, *From the Black Sox to the Sky Box: The Evolution and Mechanics of Commissioner Authority*, 10 TEX. REV. ENT. & SPORTS L. 23, 32 (2008) (citing 29 U.S.C. § 158(d)).

163. Walter T. Champion, Jr., "Mixed Metaphors," *Revisionist History and Post-Hypnotic Suggestions on the Interpretation of Sports Antitrust Exemptions: The Second Circuit's Use in Claret of a Piazza-like "Innovative Reinterpretation of Supreme Court Dogma"*, 20 MARQ. SPORTS L. REV. 55, 67 (2009).

164. See Jeffrey Hoffmeyer, *Fourth Down and an Appeal: The Nonstatutory Exemption to Antitrust Law in Claret v. National Football League*, 13 SPORTS LAW. J. 193, 199 (2006).

165. See George T. Stiefel, III, Comment, *Hard Ball, Soft Law in MLB: Who Died and Made WADA the Boss?*, 56 BUFF. L. REV. 1225, 1229 (2008).

166. Sean W.L. Alford, *Dusting Off the AK-47: An Examination of NFL Players' Most Powerful Weapon in an Antitrust Lawsuit Against the NFL*, 88 N.C.L. REV. 212, 223 (2009).

167. See *id.*

168. See Michael C. Harper, *Multiemployer Bargaining, Antitrust Laws, and Team Sports: The Contingent Choice of a Broad Exemption*, 38 WM. & MARY L. REV. 1663, 1692 (1997).

169. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 253 (1996) (Stevens, J., dissenting).

170. See Harper, *supra* note 168, at 1692; see also Sherman Antitrust Act, 15 U.S.C. § 1 (1890) ("[e]very contract, combination ... or conspiracy, in restraint of trade or commerce ... is declared to be illegal"); Marc Edelman & Brian Doyle, *Antitrust and "Free Movements" Risks of Expanding U.S. Professional Sports Leagues Into Europe*, 29 NW. J. INT'L L. & BUS. 403, 413-15 (2009) (describing antitrust laws related to labor restraints).

Tension arises between these two areas of law as multi-employer bargaining oftentimes involves all of the employers for a specific group of workers, thus restraining the workers' ability to negotiate for employment in the free market.¹⁷¹ Due to this conflict, courts and legislatures have developed both statutory and nonstatutory exemptions that prevent courts from applying antitrust laws to the collective bargaining process and any resultant CBA.¹⁷² In this regard, these exemptions protect labor laws from the wrath of antitrust regulation, thus favoring the policy goals of labor laws—specifically, allowing collective action in the form of collective bargaining to achieve better wages for workers in that field than individuals in the free market might garner.¹⁷³ The most relevant exemption for professional sports leagues is the nonstatutory exemption. For the nonstatutory exemption to apply, a court must apply a three-prong test. First, the restraint that would otherwise violate antitrust laws must “primarily affect[] only the parties to the collective bargaining relationship.”¹⁷⁴ Second, the restraint must involve a mandatory subject of collective bargaining.¹⁷⁵ Finally, the collective bargaining—including the restraint at issue—must have been accomplished through arms-length bargaining.¹⁷⁶ Assuming that all three parts of the test are met, the restraint at issue will be exempt from antitrust laws.

All professional sports leagues, except MLB, fall within the scope of antitrust laws.¹⁷⁷ Given that a commissioner's disciplining of an athlete—which can include fines, suspensions, or even banishment from the league—affects the demand for the player's services and could potentially have significant economic effects on the player, commissioner punishment of players constitutes a restraint that would otherwise violate antitrust laws.¹⁷⁸ However, because the commissioner's best interest authority—and other sources of authority such as the standard player's contract—affects only those parties in the collective bargaining relationship (that is, the players and owners), commissioner punishment handed out pursuant to this best interest power qualifies for the nonstatutory exemption and thus is immune to antitrust laws.¹⁷⁹

The significance of the CBA can also be seen through its role as the definitive governing document regarding the terms and conditions of players' employment. Because of the CBA's hallowed status, the league cannot unilaterally change its terms and conditions without engaging in the collective bargaining process.¹⁸⁰ In this regard, when the power of the commissioner is limited or curtailed through the CBA, it cannot be unilaterally expanded without engaging in collective bargaining. Though not specifically involving the

171. See Alford, *supra* note 166, at 223.

172. See *id.* at 223-24.

173. See *Brown*, 518 U.S. at 253 (Stevens, J., dissenting).

174. *Mackey v. Nat'l Football League*, 543 F.2d 606, 614 (1976).

175. See *id.*

176. See *id.*

177. See John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 705 (1977); see also *Fed. Baseball Club of Baltimore*, 259 U.S. at 200 (establishing MLB's antitrust exemption); *Toolson*, 346 U.S. at 356 (upholding MLB's antitrust exemption); *Flood*, 407 U.S. at 258 (upholding MLB's antitrust exemption); *Radovich*, 352 U.S. at 447 (holding that professional sports leagues, other than MLB, were engaged in interstate commerce, and therefore, were not exempt from antitrust laws).

178. See Weistart, *supra* note 177, at 705-06.

179. See *Out of Bounds*, *supra* note 159, at 1061-62. But see Edelman, *supra* note 61, at 641-57 (analyzing whether the NFL PCP violates antitrust laws because it was not explicitly part of the collective bargaining process).

180. See Stiglitz, *supra* note 150, at 173. However, as noted above, the commissioner—or a league's owners—can make unilateral changes that do not involve the mandatory subjects of collective bargaining. See Daniels & Brooks, *supra* note 162, at 32.

CBA in each case, the *Riko Enterprises, Inc., Professional Sports, Ltd.*, and *Chicago National League Baseball Club* cases discussed above provide pointed examples where courts have held that the commissioner's powers were limited by other provisions in the governing documents, and therefore the commissioner had over-stepped his authority by acting in the manner he did.

Two cases from the NFL provide examples that involve courts holding that a commissioner exceeded his authority based on the limiting provisions contained in the CBA. In *National Football League Players Ass'n v. National Labor Relations Board*,¹⁸¹ NFL owners sought to unilaterally implement a new rule that automatically fined a player for leaving the bench area during a fight on the field.¹⁸² The court held that the owners' promulgation and implementation of the rule constituted an unfair labor practice in violation of the NLRA because it was a unilateral change to the CBA.¹⁸³ In the second case, Commissioner Rozelle, acting pursuant to his best interest authority, sought to unilaterally implement a new drug testing program that included random drug-testing.¹⁸⁴ In the case, while the arbitrator ruled that the Commissioner retained broad authority under the best interest power, he noted that the NFL CBA's Article XXXI limited the Commissioner's authority because it precluded all random drug-testing.¹⁸⁵ The arbitrator thus barred Commissioner Rozelle from implementing the new drug testing program because it had not been part of the collective bargaining process, thus constituting a change in the terms and conditions of employment.¹⁸⁶

These cases demonstrate that courts and arbitrators will rule against a commissioner—even when he is acting under his best interest authority—when their actions exceed the limitations put on the commissioner's authority, as set forth in the CBA or another governing document. In this regard, the stakes become ever-greater for the NBPA and NFLPA with respect to their respective upcoming CBA renegotiations and the possibility of limiting the commissioner's power to punish players for misbehavior off the court or field during the period covered by the new CBA.

F. Implications for the Upcoming CBA Renegotiations

Given the legal protections provided the power of the commissioner to discipline in the CBA, the NBPA and NFLPA may focus some of their renegotiation efforts on amending the commissioner's power. There are several reasons why the unions may do so—some more obvious than others. On the obvious side, as commissioners increase the severity of their punishments for transgressions committed off the court or field, offending players lose more and more money due to fines and the loss of salary that accompanies suspensions.¹⁸⁷ Since most professional athletes have a very limited window of time to

181. 503 F.2d 12 (8th Cir. 1974).

182. *Id.* at 13.

183. *See id.* at 17.

184. *See* Ethan Lock, *The Legality Under the National Labor Relations Act of Attempts by National Football League Owners to Unilaterally Implement Drug Testing Programs*, 39 U. FLA. L. REV. 1, 12-13 (1987).

185. *See* Mark M. Rabuano, *An Examination of Drug-Testing as a Mandatory Subject of Collective Bargaining in Major League Baseball*, 4 U. PA. J. LAB. & EMP. L. 439, 450-51 (2002).

186. *See* David J. Sisson & Brian D. Trexell, *The National Football League's Substance Abuse Policy: Is Further Conflict Between Players and Management Inevitable?*, 2 MARQ. SPORTS L.J. 1, 8-9 (1991).

187. *See* Marks, *supra* note 67, at 1597 (noting that Adam "Pacman" Jones lost \$1.3 million in salary to suspensions, while Chris Henry lost more than \$200,000).

make significant salaries playing their sport, the incidence of more severe punishments handed down by the commissioner erodes a base of earnings that many professional players depend upon for life after their athletic careers. It is understandable, then, why many players may push their unions to limit this broad commissioner power.

Another obvious reason why these unions may negotiate with the leagues over the power of the commissioner to discipline is the persistent question of whether a league—through its commissioner—should punish athletes for actions taken off of the court or field. This question breaks down into two key subparts or sub-questions. First, is it appropriate for leagues to punish players for criminal acts committed off of the court or field before the player has been found guilty in a court of law?¹⁸⁸ As detailed above, a commissioner's authority to punish is not constrained by the need for a guilty plea or verdict in a court of law; the commissioner can punish a player for his actions off the court or field that he believes are not in the best interest of the sport.¹⁸⁹ However, this approach runs afoul of our societal notions of innocent until proven guilty. Those concerns, of course, are mitigated by the fact that professional sports leagues are voluntary, private organizations whose terms and conditions of employment are set through collective bargaining. Nevertheless, the players may push their unions to negotiate to amend the commissioner's power due to this concern.

The second sub-question is whether leagues should be disciplining athletes for non-criminal behavior committed off the court or field. As detailed above, former players John Rocker and Dennis Rodman, and former coach John Calipari were suspended and/or fined for making racially insensitive comments to the media. While ill-advised, such comments did not violate any laws. However, under each commissioner's best interest authority, the MLB Commissioner—in the case of Rocker—and the NBA Commissioner—in the cases of Rodman and Calipari—handed down punishment in response. As one scholar has noted, “[t]here is a real risk that the definition of proper conduct will be drawn so narrowly as to infringe upon the political, religious, or social prerogatives of the players.”¹⁹⁰ Some have even viewed commissioners' disciplining of athletes for misbehavior off the court or field in a much more nefarious light, suggesting that there is “evidence of a conscious effort to truncate player autonomy under the guise of social authority.”¹⁹¹ In addition to facing potential discipline for non-criminal acts, players also face new rules that attempt to control their personal actions. For example, in 2007, the NBA mandated that its players not visit certain nightclubs that league security determined to be ill-suited for its players to attend.¹⁹² Players violating this policy are subject to a significant fine.¹⁹³ In this regard, players may feel as though the league has too much control over their personal lives and may want that aspect of the commissioner's power reigned in.

There are other less-obvious, but equally-important reasons why the players' unions may push for reform in the area of a commissioner's power to punish. The first has to do with procedure. In professional sports leagues, the commissioner—or his designee—

188. See Bukowski, *supra* note 11, at 111.

189. For example, NFL Commissioner Roger Goodell suspended Cincinnati Bengals' wide receiver Chris Henry after he was arrested four times, even though he was never convicted of any of the alleged crimes. See Lockwood, *supra* note 23, at 164.

190. Weistart, *supra* note 177, at 722.

191. Lockwood, *supra* note 23, at 139; see also Michael A. McCann, *The Reckless Pursuit of Dominion: A Situational Analysis of the NBA and Diminishing Player Autonomy*, 8 U. PA. J. LAB. & EMP. L. 819, 858 (2006).

192. See Showalter, *supra* note 40, at 212.

193. See *id.*

investigates, conducts the hearing (if one is held at all), and imposes the punishment for transgressions committed off of the court or field—with little oversight of the integrity of the process or the decision.¹⁹⁴ Scholars have criticized this model of a commissioner sitting as accuser, judge, and jury because it gives rise to perceived, if not real, bias.¹⁹⁵ Indeed, the case involving Pete Rose and MLB Commissioner Bart Giamatti demonstrates this issue, as the court granted Rose a temporary injunction because it determined that the Commissioner had prejudged Rose's guilt.¹⁹⁶ Moreover, without procedural protections or punishment guidelines, this disciplinary approach lacks uniformity and consistency and may be riddled with arbitrariness.¹⁹⁷ In this regard, players' unions may seek to provide more procedural protections—most likely through grievance procedures—to protect players from perceived or actual bias and inconsistency or arbitrariness in the current system.

Finally, players' unions may seek to negotiate on the power of their commissioner to discipline wayward athletes in order to avoid the commissioner instituting the equivalent of a personal conduct policy (PCP) in their league without it being collectively bargained. While the NFLPA consulted with NFL Commissioner Roger Goodell regarding the NFL PCP—indeed, they did agree to it—they have been roundly criticized for not insisting that the policy be collectively bargained.¹⁹⁸ However, this collaboration between Commissioner Goodell and the NFLPA could also be viewed as a harbinger of things to come with regard to including such PCPs in the collective bargaining process. If such cooperation signals that both the leagues and the players' unions understand the importance of addressing misbehavior off of the court or field that creates public image problems for the league and its players, then this may encourage both sides to reach agreement through collective bargaining to address this increasing problem. In this regard, the NBPA and NFLPA may have an incentive to work with their respective commissioners to include player conduct policies in the CBA so that they will not face the commissioner unilaterally implementing such a policy, and then be forced to sue over his authority to do so—on ground that it was an unfair labor practice since it was not part of the CBA. Moreover, as detailed above, if a PCP is a part of the CBA, then it will serve to limit the best interest power of the commissioner to discipline players for transgressions committed off of the court or field. In this regard, by incorporating a PCP—or more explicit limitations to the commissioners' best interest authority to punish athletes—into the CBA, players' unions can protect against this expansive power and provide for better, or at least clearer, parameters for such punishment.¹⁹⁹

194. See Dobinson & Thorpe, *supra* note 39, at 120.

195. Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127, 162-63 (1996).

196. See Curtis, *supra* note 26, at 27-28.

197. See Kim & Parlow, *supra* note 5, at 596; see also Dobinson & Thorpe, *supra* note 39, at 120-21.

198. See generally Edelman, *supra* note 61, at 631; Mahone, Jr., *supra* note 62, at 181; Marks, *supra* note 67, at 1581.

199. One other possibility may be for the NBPA and NFLPA to push for more disciplining to fall to the teams instead of the league or the commissioner. While teams currently have some authority to impose disciplinary measures on their players, the players' unions may have good reason to push for a shift from commissioner-imposed punishment to more team-based disciplining. See Stiglitz, *supra* note 150, at 179-80 (discussing how many believe that teams are far less likely to punish wayward players because they fear that such punishment will provide a disincentive for free agents to sign with their team in the future). Understandably, a situation like this where the power to discipline exists but is not often exercised—which is not currently the case with the commissioner—may have great appeal to the players. However, one can imagine the reticence of commissioners and owners to move to this type of disciplinary approach. See *id.*

V. CONCLUSION

These various impetuses for negotiating on, and perhaps altering, the power of the commissioner to discipline wayward players for actions committed off the court or field may or may not prove to be fruitful. Both leagues face difficult economic times, with drops in league revenue and teams losing money, standing in stark contrast to the years of significant economic growth that marked much of the past decade.²⁰⁰ In fact, due to the economic recession and declining revenues, NBA Commissioner David Stern recently proposed a rather controversial reduction in the percentage of revenues allocated to the players in the new CBA: currently, the players receive 57% of basketball related income,²⁰¹ while Commissioner Stern proposed this become 45% under the new CBA.²⁰² This may create a situation similar to what the NBPA faced in the 1960s and 1970s when its focus was on providing economic gains for the players, rather than negotiating harder on other employment-related matters such as the Commissioner's best interest authority.²⁰³ In this regard, players' unions may need to use the issue of the power of the commissioner to discipline as a bargaining chip with their respective leagues in order to gain the revenue concessions that will likely be their top priority.

However, players' discontent with the current situation can only be resolved through the collective bargaining process, for once a commissioner's power is ensconced in the CBA, the players have little recourse to challenge the punishment—beyond whatever grievance procedures are allowed pursuant to the CBA. If the players want to alter this broad commissioner power to discipline—beyond the constraints of the proportionality requirements imposed by arbitrators and any limitations set by the respective league's governing documents—the renegotiations of the NBA's and NFL's CBAs provide a unique opportunity to do so, at what many feel may be an appropriate or advantageous time.

200. See Ken Berger, *Head Straight to Gate for Sign of Weakness in NBA Money Machine*, CBSSPORTS.COM, July 8, 2009, <http://www.cbssports.com/nba/story/11934840> (noting that the NBA was expecting a drop of between 2.5% and 5% in basketball related income for the league for the 2009-10 season); Brian Karpuk, *Will There Be An NBA Lockout in 2011?*, NEWS BURGALAR, June 3, 2009, <http://newsburglar.com/2009/06/03/nba-lockout-2011/> (discussing rumors that more than half of NBA teams lost money in the 2008-09 season).

201. "Basketball Related Income" is defined as the aggregate operating revenues acquired by the NBA or one of its subsidiaries. See NBA COLLECTIVE BARGAINING AGREEMENT art. VII, § 1(a), 1(b).

202. Frank Hughes, *NBA Expected to Take Hard Line in First Proposal to Union for New CBA*, SPORTSILLUSTRATED.COM, Jan. 29, 2010, http://sportsillustrated.cnn.com/2010/writers/frank_hughes/01/29/labor.strife/index.html. In fact, Commissioner Stern may also attempt to redefine what constitutes basketball related income. See *id.*

203. See Lockwood, *supra* note 23, at 149-50.

